

Delivery of specialised services via electronic medium does not qualify as OIDAR services – Bombay HC

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Summary

The Bombay High Court (HC) held that merely transferring files via electronic medium does not qualify these services as online information and database access or retrieval (OIDAR) services. The HC noted that in the present case, services involved specialised work that would not be freely available on the internet. The HC referred to the relevant clauses of the service agreement and ruled that the services qualify as export of services. Further, in light of the principle of substance over form, the HC held that the Appellate Authority had misconstrued the purport and intent of the agreement.

Facts of the case

- Globolive 3D Private Limited (petitioner) entered into a service agreement with M/s. Emirates Defence Industries Co. PJSC (service recipient) to provide technical services for the production of 3D city models of three cities, Abu Dhabi, AL Ain and Al Dhafra, as per specifications provided by the service recipient.
- The petitioner imported very high-resolution (VHR) stereo satellite images from M/s. 4 Earth Intelligence Limited (vendor) to provide the services.
- After processing and digitising the satellite images, the petitioner produced satellite models, which were shared online via file transfer protocol (FTP).
- The petitioner contended that the transaction amounted to the export of services, and hence, it was entitled to a refund of unutilised input tax credit (ITC), which was initially sanctioned by the Department (Respondent). Subsequently, the refund order was reviewed and concluded as not legal and proper.
- The Department stated that the services provided by the petitioner qualify as OIDAR services, not as export of services. The Appellate Authority allowed the Department's appeal.

- Therefore, the petitioner filed the present writ petition for setting aside the order in appeal and granting a refund of ITC on account of the export of services.

Bombay HC observations and judgement [Writ Petition No. 39/2023; order dated 24 August 2023]

- **Services qualify as export of services:** The HC referred to the relevant clauses of the service agreement and observed that the service recipient had engaged the petitioner to provide the said technical services based on experience, skill and knowledge. The HC noted that the recipient of services, not being an establishment of a distinct person, was located outside India, the place of supply was agreed to be outside India, and the payment for the services was in convertible foreign exchange. Accordingly, the petitioner qualified the conditions prescribed for the export of services.
- **Mere delivery of specialised services through electronic medium cannot render the services as OIDAR:** The HC explained the definition of OIDAR and stated that the petitioner's service is not merely a delivery of the nature mediated by information technology over the internet or is a delivery available on an electronic network, and the nature of

which would render their supply essentially automated without and/or with minimal human intervention. The HC held that merely transferring the file through an electronic medium did not imply that the services were OIDAR services. Further, services pertained to specialised work which would not be freely available on the internet, hence, do not fall under the preview of OIDAR services.

- **Substance over form would hold importance:** The HC stated the SC ruling in the case of Bhopal Sugar Industries Ltd., wherein it was held that it is a well-settled principle that while interpreting the terms of the agreement, the Court would be required to look at the substance rather than form of the agreement. Accordingly, the HC held that the Appellate Authority had misconstrued the purport and intent of the agreement.

Our comments

The concept of OIDAR services was introduced under the service tax regime, which has been continued even under the GST law.

In the present ruling, the HC interpreted the definition of OIDAR services in detail and ruled that the petitioner's specialised service is not merely a delivery mediated by information technology over the internet or an electronic network characterised essentially by automated supply without/with minimal human intervention.

Further, it is important to note that for the purpose of interpretation of terms of agreement, the principle of substance over form shall prevail. Earlier, the Supreme Court, in the case of Bhopal Sugar Industries Ltd, had also held the same.

This is an important ruling and may set precedence in similar matters.

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